UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RICARDO MERCADO-GUILLEN,

Plaintiff,

v.

KIRSTJEN NIELSEN, et al.,

Defendants.

Case No. 18-cv-00727-HSG

ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR WRIT OF HABEAS CORPUS AND DENYING MOTION FOR TEMPORARY RESTRAINING ORDER

Re: Dkt. Nos. 1, 10

Petitioner Ricardo Mercado-Guillen is currently in the custody of U.S. Immigration and Customs Enforcement ("ICE") pending the conclusion of his removal proceedings. On February 1, 2018, Mr. Mercado[1] filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in which he requests the Court to order his release from custody or to order a bond hearing before an Immigration Judge ("IJ"). Dkt. No. 1 ("Petition"). On February 5, 2018, Mr. Mercado filed a motion for a temporary restraining order ("TRO") seeking to enjoin his continued detention without a bond hearing. Dkt. No. 10.

After completion of the briefing on both the petition and the motion for a TRO, the Court ordered the parties to provide supplemental briefing to address the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). Dkt. No. 18. Having reviewed the completed briefing, the Court finds this matter suitable for resolution without a hearing. Civ. L.R. 7-1(b). For the following reasons, the petition is GRANTED in part and DENIED in part. The motion for a TRO is DENIED as moot.

I. BACKGROUND

Mr. Mercado is a Mexican citizen who has lived in the United States since January of

[1] The petition generally refers to the Petitioner as "Mr. Mercado," so the Court will do so as well.

2000. Petition ¶ 13. Mr. Mercado has three children who are U.S. citizens, and has been employed in Oakland since 2003. *Id* ¶ 14.

In April of 2007, Mr. Mercado was convicted of driving under the influence. Dkt. No. 15-1 ("Hubbard Decl.") ¶ 3. On April 4, 2012, ICE removed Mr. Mercado to Mexico. *Id.* ¶ 4. On or around April 18, having re-entered the United States from Mexico, Mr. Mercado was again detained and removed to Mexico. Petition ¶ 16; Hubbard Decl. ¶ 4. Mr. Mercado immediately re-entered the United States. Petition ¶ 16. On April 10, 2017, Mr. Mercado submitted a letter to the United States Citizenship and Immigration Services Asylum Office, requesting that ICE decline to order expedited removal because Mr. Mercado was an applicant for derivative asylum based on his wife's May 6, 2016 asylum application. Petition ¶¶ 17–18; Dkt. No. 4 at 6–7. On July 11, 2017, ICE apprehended and detained Mr. Mercado for illegally re-entering the United States after removal. Petition ¶ 19; Dkt. No. 15 ("Response") at 5. Mr. Mercado expressed a fear of persecution in Mexico and was referred for a reasonable fear interview with an asylum officer, but on July 21, 2017, the Asylum Office made a negative reasonable fear finding. Petition ¶ 20. Mr. Mercado requested review by an Immigration Judge ("IJ") that same day. *Id.* On August 15, 2017, the IJ affirmed negative fear finding of the Asylum Office, and returned the case to ICE to execute the removal order. Petition ¶ 21; Response at 5.

On or around August 15, 2017, Mr. Mercado filed a motion in the Ninth Circuit to stay removal. Petition ¶ 22; Response at 5. Mr. Mercado's motion was denied on January 26, 2018. Response at 5. Mr. Mercado subsequently filed a motion for reconsideration, which was granted by the Ninth Circuit on January 30, 2018. Petition ¶ 23; Response at 5. On September 20, 2017, ICE served Mr. Mercado with its decision to continue his detention during the pendency of his appeal. Response at 5. On December 20, 2017, Mr. Mercado filed a motion to seek a prolonged immigration custody hearing, pursuant to *Rodriguez v. Robbins* (*"Rodriguez III"*), 804 F.3d 1060 (9th Cir. 2015). Petition ¶ 24. The IJ denied the motion on December 27, 2017, citing lack of jurisdiction. Petition ¶ 25; Response at 5; Hubbard Decl., Ex. G at 2 ("[R]espondents in negative reasonable fear proceedings are not in removal proceedings under section 240 of the [Immigration and Nationality] Act and are not seeking direct or collateral review of a final removal order.

Instead, they are seeking withholding of a final removal order under section 241(a)(5) of the Act, and will remain subject to the reinstated removal order even if withholding of removal is ultimately granted."). On January 9, 2018, Mr. Mercado again filed a motion for a custody hearing based on his detention of over 180 days. Petition ¶ 26. The IJ again denied the motion for lack of jurisdiction on January 12. Petition ¶ 26; Response at 5. On January 19, 2018, Mr. Mercado filed a notice of appeal with the Board of Immigration Appeals ("BIA"). Petition ¶ 27. That appeal was dismissed on April 5, 2018. Dkt. No. 22. Mr. Mercado now petitions for a writ of habeas corpus, asserting that his continued detention without a bond hearing is unlawful.

II. PETITION FOR WRIT OF HABEAS CORPUS

A. Detention of Non-Citizens Under the Immigration and Nationality Act

Multiple provisions within the Immigration and Nationality Act ("INA") govern the detention of non-citizens awaiting removal from the United States. Section 1226(a) gives the Department of Homeland Security ("DHS") authorization to detain a non-citizen "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). 8 U.S.C. § 1231(a) governs the detention of non-citizens who have already been ordered removed. Section 1231(a) authorizes detention both during and after the "removal period." The removal period generally lasts 90 days beginning from the latest of: (1) the date the order of removal becomes administratively final; (2) if a court orders a stay of the removal of the alien, the date of the court's final order; or (3) if the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement. 8 U.S.C. § 1231(a)(1)(A); *Diouf v. Napolitano* ("*Diouf II*"), 634 F.3d 1081, 1085 (9th Cir. 2011). During the removal period, detention is mandatory. 8 U.S.C. § 1231(a)(2). Section 1231(a)(6) grants DHS the discretionary authority to continue to detain non-citizens beyond the removal period, if that person "has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6); *Prieto-Romero v. Clark*, 534 F.3d 1053, 1059 (9th Cir. 2008). The parties do not dispute that Mr. Mercado is being detained pursuant to the discretionary authority authorized under section 1231(a)(6). Response at 2; Dkt. No 16 ("Traverse") ¶ 9.

A non-citizen who expresses fear of removal to the country specified in the removal order is referred to an asylum officer for a "reasonable fear determination." 8 C.F.R. § 238.31; 8 C.F.R. § 241.8(e). If it is determined that the non-citizen has a reasonable fear of persecution or torture, the asylum officer refers the matter to an immigration judge to consider the request to withhold removal. 8 C.F.R. § 208.31(e). In these "withholding-only" proceedings, the IJ may only consider whether the non-citizen is "eligible for withholding or deferral of removal," and "all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief." 8 C.F.R. § 1208.2(c)(3)(i).

B. Legal Framework

In *Zadvydas v. Davis*, the Supreme Court considered whether 8 U.S.C. § 1231(a)(6) allowed the detention of a non-citizen being held beyond the removal period. *Zadvydas v. Davis*, 533 U.S. 678 (2001). The Court determined that a statute permitting that type of indefinite detention would "raise a serious constitutional problem," and that the section 1231(a)(6) "limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." *Id.* at 689–90. The Court held that six months was a presumptively reasonable period of detention for a non-citizen held under section 1231(a)(6), and that after this period, once the non-citizen "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* at 701.

In *Diouf II*, the Ninth Circuit held that "prolonged detention under § 1231(a)(6), without adequate procedural protections would raise serious constitutional concerns." *Diouf II*, 634 F.3d at 1086 (internal quotation marks omitted). The court held that a non-citizen "facing prolonged detention under § 1231(a)(6) is entitled to a bond hearing before an immigration judge and is entitled to be released from detention unless the government establishes that the [non-citizen] poses a risk of flight or a danger to the community." *Id.* at 1092. The court defined "prolonged" detention as detention that "has lasted six months and is expected to continue more than minimally beyond six months." *Id*. at 1092 n.13.

C. Application to Mr. Mercado

Respondents make several arguments in an effort to distinguish Mr. Mercado's case from the facts of *Diouf II*.[2] Respondents contend that *Diouf II* does not apply to Mr. Mercado's petition because Mr. Mercado, as a petitioner in withholding-only proceedings, will remain subject to removal regardless of the result of his application for withholding of removal. Response at 9–10. This argument is unavailing. *Diouf II* did not draw Respondents' proposed distinction between different types of section 1231(a)(6) detainees, stating that "[s]ection 1231(a)(6) encompasses aliens such as Diouf, whose collateral challenge to his removal order (a motion to reopen) is pending in the court of appeals, as well as [] aliens who have exhausted all direct and collateral review of their removal orders but who, for one reason or another, have not yet been removed from the United States." *Diouf II*, 634 F.3d at 1085. Thus, *Diouf II* applies to all non-citizens who are detained under section 1231(a)(6). *See Cortez v. Sessions*, No. 18-CV-01014-DMR, 2018 WL 1510187, at *8 (N.D. Cal. Mar. 27, 2018) ("The Ninth Circuit in *Diouf II* extended the right to a bond hearing to *all* non-citizens detained more than six months under section 1231(a)(6)").

Respondents additionally contend that because, unlike the petitioner in *Diouf II*, Mr. Mercado was never lawfully admitted into the United States, the "government's interest in detaining aliens previously removed who have illegally reentered the United States presents qualitatively different concerns than those addressed in *Diouf II*." Response at 9. Respondents do not explain how this factual distinction between Mr. Mercado's case and Mr. Diouf's case would alter this Court's analysis, other than again noting that Mr. Mercado's removability is not in question. For the same reasons outlined above, the Court finds that Respondents have failed to distinguish Mr. Mercado's case from the group of non-citizen detainees addressed in *Diouf II*.

[2] Respondents also initially contended that the Court should dismiss Mr. Mercado's habeas petition for failure to exhaust administrative remedies, because his January 19, 2018 appeal to the Board of Immigration Appeals was still pending at the time of Respondents' briefing. Response at 7; Petition ¶ 27. Mr. Mercado's appeal to the BIA has since been dismissed. *See* Dkt. No. 22. As a result, whether or not administrative exhaustion is required, the Court finds that Mr. Mercado has satisfactorily exhausted his available judicial and administrative remedies. *See Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017) ("[A] court may waive the prudential exhaustion requirement if administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void.") (internal quotation marks omitted).

Respondents also contend that, under *Zadvydas*, Mr. Mercado must demonstrate that there is not a "significant likelihood of removal in the reasonably foreseeable future" in order to receive a bond hearing. Response at 10 (citing *Zadvydas*, 533 U.S. at 701). *Zadvydas*, however, did not consider the present question of whether detention beyond the presumptively reasonable six-month period entitles a non-citizen held to a bond hearing when removal is not imminent. The Ninth Circuit examined this question with respect to section 1231(a)(6) in *Diouf II*. *Diouf II*'s ruling does not conflict with *Zadvydas*. Thus, the Ninth Circuit has held that non-citizens detained under section 1231(a)(6) beyond the presumptively-reasonable six month period are entitled to a bond hearing when removal is not imminent. *Diouf II*, 634 F.3d at 1092-93 and n.13. Respondents' contention that "Petitioner has not and cannot show that he is not subject to removal in the reasonably foreseeable future" is not sufficient to demonstrate that Mr. Mercado's removal is imminent, given that more than two months have elapsed since Respondents first made that argument, and Mr. Mercado remains in ICE custody. *See* Response at 10.

Respondents finally contend that, based on *Rodriguez III* and now *Jennings*, the absence of higher court analysis with respect to non-citizens detained under section 1231(a) indicates that the reasoning of the Ninth Circuit in *Diouf II* may be invalid. Dkt. No. 20 at 3–4. But *Diouf II* remains good law. The Supreme Court's decision in *Jennings* overruled the holdings in *Rodriguez III* and *Casas-Castrillion* that non-citizens detained under sections 1225(b)(1), 1225(b)(2), and 1226(c) are entitled to bond hearings every six months, finding that *Rodriguez III* misapplied the canon of constitutional avoidance. *Jennings*, 138 S. Ct. at 842. The *Jennings* Court specifically noted the difference between the language in section 1231(a)(6) and the language in sections 1225(b) and 1226(c). *Id*. at 844. *Jennings* therefore left in place the *Zadvydas* ruling with respect to section 1231(a)(6), which serves as a legal basis for the holding of *Diouf II*. *See Cortez v. Sessions*, No. 18-CV-01014-DMR, 2018 WL 1510187, at *8 (N.D. Cal. Mar. 27, 2018) ("*Diouf II* remains good law which this court is bound to follow.") (citing *Ramos v. Jennings*, No. 18-cv-00413-JST, 2018 WL 1317276, at 3 (N.D. Cal. Mar. 13, 2018)).

Mr. Mercado falls directly within the category of non-citizens held under section 1231(a)(6) governed by *Diouf II*, which remains valid precedent that this Court must follow.

Therefore, Mr. Mercado is entitled to a bond hearing, during which DHS must establish by clear and convincing evidence that he is a flight risk or a danger to the community if his detention is to continue. This Court does not have sufficient information to determine in the first instance whether Mr. Mercado is a flight risk or a danger to the community, and expresses no view on that point at this stage. For that reason, Mr. Mercado is not entitled to immediate release from custody, and his request for immediate release is **DENIED**.

III. CONCLUSION

For the foregoing reasons, Mr. Mercado-Guillen's petition for writ of habeas corpus is **GRANTED IN PART** and **DENIED IN PART**. Within 15 days of the date of this order, Mr. Mercado-Guillen must be provided with a bond hearing before an immigration judge. At that hearing, DHS must establish by clear and convincing evidence that Mr. Mercado-Guillen is a flight risk or a danger to the community in order to continue his detention.

In his motion for a temporary restraining order, Mr. Mercado-Guillen seeks identical relief as in his petition. His motion for a temporary restraining order is therefore **DENIED** as moot.

IT IS SO ORDERED.

Dated: 4/19/2018

HAYWOOD S. GILLIAM, JR.
United States District Judge